

06-096

## DEPARTMENT OF ENVIRONMENTAL PROTECTION

**Chapter 157: CO<sub>2</sub> Budget Trading Program Waiver and Suspension**

SUMMARY: This regulation provides the Commissioner the authority, under exceptional circumstances, to waive or suspend requirements of the CO<sub>2</sub> Budget Trading Program, 06-096 CMR Chapter 156.

**1. Definitions.** For the purposes of this Chapter the following definitions shall have the following meanings:

- A. Emergency event.** “Emergency event” means an event that is unforeseeable, unavoidable and beyond the control of the CO<sub>2</sub> owner of a budget unit, for which the carbon dioxide budget unit bears no responsibility, such as an act of God, war, riot, insurrection, terrorist act, natural disasters, epidemic, national general strike.
- B. CO<sub>2</sub> allowance.** “CO<sub>2</sub> allowance” means a limited authorization by the Department under the CO<sub>2</sub> Budget Trading Program to emit up to one ton of CO<sub>2</sub>, subject to all applicable limitations contained in this regulation. No provision of this regulation shall be construed to limit the authority of the Department to terminate or limit such authorization to emit. This limited authorization does not constitute a property right.
- C. CO<sub>2</sub> allowance price.** “CO<sub>2</sub> allowance price” means the price for CO<sub>2</sub> allowances in the CO<sub>2</sub> Budget Trading Program for a particular time period as determined by the Department or its agent, calculated based on a volume-weighted average of transaction prices reported to the Department or its agent, at the Department’s discretion, taking into account prices as reported publicly through reputable sources.
- D. CO<sub>2</sub> Budget Unit.** “CO<sub>2</sub> budget unit” means a fossil fuel-fired unit that is capable of serving a generator with a nameplate capacity equal to or greater than 25 MW electrical output.
- E. Control period.** “Control period” means a three-calendar-year time period, unless extended to four years upon occurrence of a stage two trigger event. The first control period is from January 1, 2009 through December 31, 2011, provided, however, that if a stage two trigger event occurs during the first control period, then the first control period will be extended one-year through December 31, 2012. Each subsequent sequential three-calendar-year period is a separate control period that is subject to one one-year extension upon occurrence of a stage two trigger event during the control period. In no event may a control period be longer than four calendar years.
- F. Immediate and Irreparable Harm.** “Immediate and irreparable harm” means imminent and catastrophic financial loss, including but not limited to, the termination of business at the CO<sub>2</sub> budget unit’s location or declaration of bankruptcy pursuant to Chapter 11 of the United States Bankruptcy Code, provided such immediate and irreparable harm is beyond the control of the owner of a CO<sub>2</sub> budget unit.
- G. Market settling period.** “Market settling period” means the first fourteen months of any control period.

- H. Stage two trigger event.** “Stage two trigger event” means the occurrence of any twelve-month period that completely transpires following the market settling period and is characterized by an average CO<sub>2</sub> allowance price that is equal to or greater than the stage two threshold price.
- I. Temporary Suspension of Compliance.** “Temporary Suspension of Compliance” means a short-term exemption from the compliance obligations set forth in section 5 of CO<sub>2</sub> Budget Trading Program, 06-096 CMR Chapter 156, granted by the Commissioner to a CO<sub>2</sub> budget unit upon satisfactory demonstration of the occurrence of an emergency event, as defined in this Chapter.
- H. Temporary Waiver of Enforcement.** “Temporary Waiver of Enforcement” means an exercise of the Commissioner’s inherent enforcement discretion to waive enforcement of violations of the CO<sub>2</sub> Budget Trading Program, 06-096 CMR Chapter 156, as guided by the provisions of this Chapter.

## **2. Temporary Waiver of Enforcement.**

- A. Authority to Temporarily Waive Enforcement.** The Commissioner intends to exercise her inherent enforcement discretion to waive enforcement of violations of the CO<sub>2</sub> Budget Trading Program, 06-096 CMR Chapter 156, if the Commissioner finds that a CO<sub>2</sub> budget unit would have suffered immediate and irreparable harm, as defined in this Chapter, by complying with the CO<sub>2</sub> Budget Trading Program, and that such harm would have been the direct result of the CO<sub>2</sub> allowance price. Nothing in this Chapter limits the inherent enforcement discretion of the Commissioner

### **B. Process to Request A Temporary Waiver of Enforcement**

- (1) A CO<sub>2</sub> budget unit, also referred to in this chapter as the applicant, requesting a temporary waiver of enforcement shall submit the request in writing to the commissioner.
- (2) The written request must provide the following:
  - (a) the name, location and relevant contact information sufficient for the Department to make immediate electronic or telephonic contact with the authorized representative and other representatives of the CO<sub>2</sub> budget unit;
  - (b) the specific time period for which the waiver is requested and a detailed justification for the requested time;
  - (c) evidence to demonstrate :
    - (i) that compliance with the provisions of Section 5 of CO<sub>2</sub> Budget Trading Program, 06-096 CMR Chapter 156, would have caused immediate and irreparable harm to the CO<sub>2</sub> budget unit’s operations;
    - (ii) that such immediate and irreparable harm would have been a direct consequence of the price of allowances during a specified control period;

- (iii) that the immediate and irreparable harm was beyond the control of the owner of a CO<sub>2</sub> budget unit;
  - (iv) that the immediate and irreparable harm to the CO<sub>2</sub> budget unit's operations would not have occurred but for the allowance price levels in effect during the control period;
  - (v) such other circumstances as the Commissioner deems relevant to the request; and
  - (vi) the authenticity and relevance of all information submitted by the applicant in support of its request.
- (d) a detailed compliance plan indicating specifically the steps that will be taken by the CO<sub>2</sub> budget unit to achieve compliance as soon as practicable with Section 5 of CO<sub>2</sub> Budget Trading Program, 06-096 CMR Chapter 156, and the time required to complete each step.
- (3) The Commissioner may request additional information from the applicant if necessary to review the request for a temporary waiver.
  - (4) If the written application demonstrates to the satisfaction of the Commissioner that a temporary waiver of enforcement is justified, the Commissioner may inform the applicant that he intends to waive enforcement of violations of the CO<sub>2</sub> Budget Trading Program that occurred during a specified period.
  - (5) A decision of the Commissioner on a request for temporary waiver of enforcement under this Chapter is an exercise of the Commissioner's inherent enforcement discretion and is not subject to administrative or judicial review.

### **3. Temporary Suspension of Compliance Obligations.**

**A. Authority to Temporarily Suspend Compliance Obligations.** The Commissioner has the authority, in the case of an emergency event, to temporarily suspend the compliance obligations of a CO<sub>2</sub> budget unit under its permit until such time as the Commissioner deems the emergency no longer exists.

#### **B. Process to Request A Temporary Suspension of Compliance Obligations**

- (1) A CO<sub>2</sub> budget unit requesting a temporary suspension of compliance obligations shall submit the request in writing to the commissioner.
- (2) The written request must provide the following:
  - (a) the name, location and relevant contact information sufficient for the Department to make immediate electronic or telephonic contact with the authorized representative and other representatives of the CO<sub>2</sub> budget unit;

(b) information sufficient to demonstrate:

- (i) that an emergency event has occurred;
- (ii) the duration and nature of the emergency event;
- (iii) such other circumstances as the Commissioner deems relevant to the request; and
- (iv) the authenticity and relevance of other information submitted by the applicant in support of its request.

(3) The Commissioner may request additional information from the applicant if necessary to review the request for a temporary suspension of compliance obligations.

(4) If in the judgment of the Commissioner the evidence submitted demonstrates that a temporary suspension of compliance obligations is justified due to the occurrence of an emergency event, as defined in this Chapter, the Commissioner will issue an order granting the temporary suspension. The order will suspend the compliance obligations of a source for a specified term during which the Commissioner finds compliance with the CO<sub>2</sub> Budget Trading Program is not feasible due to the emergency event. A decision of the Commissioner under this subsection is final agency action.

**4. Rules.** This rule is adopted as a major substantive rule as defined in Title 5, chapter 375, subchapter 2-A and must be submitted to the Legislature by January 15, 2008 for review by the Joint Standing Committee on Natural Resources during the Second Regular Session of the 123rd Legislature.